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California Regional Water Quality Control Board Central Coast Region



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NOTICE OF PUBLIC HEARING

COMPLIANCE WITH REMAND OF
A PORTION OF NPDES PERMIT
RE COOLING WATER INTAKE
OF NEW UNITS 1 & 2
WASTE DISCHARGE REQUIREMENTS ORDER NO. 00-041
NPDES PERMIT NO. CA0006254

ISSUED TO DUKE ENERGY MOSS LANDING, LLP
AT MOSS LANDING POWER PLANT

VOICES OF THE WETLANDS V. STATE WATER RESOURCES CONTROL BOARD ET AL.

Starting at 1:00 p.m., Thursday, May 15, 2003
Watsonville City Council Chambers
250 Main Street
Watsonville, CA 95076

Written submissions must be made at earlier dates provided below

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For additional information please contact **Michael Thomas at: (805) 542-4623** or email him at mthomas@rb3.swrcb.ca.gov or call **Gerhardt Hubner at (805) 542-4647**. Please bring this notice to the attention of any persons known to you who would be interested in this matter.
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NPDES PERMIT BACKGROUND

In 1999, Duke Energy North America and Duke Energy Moss Landing, LLC (Duke) planned to modernize the Moss Landing Power Plant (MLPP), located in Monterey County, California. Duke proposed to construct two new 530-megawatt, natural gas-fired generating units (Units 1 and 2) to replace five old units at MLPP. Two existing gas-fired generating units, Units 6 and 7 would remain in place and portions of the existing infrastructure and new infrastructure would be shared by Units 6 and 7 and the modernized Units 1 and 2. To obtain regulatory approval for its new generating units, in May 1999, Duke applied for certification from the State Energy Resources Conservation and Development Commission (Energy Commission), California's agency

that provides integrated licensing of all thermal power plants with an output of 50 megawatts or greater.

Duke also applied to the Regional Board for renewal and amendment of its existing NPDES permit for MLPP.

The old Units 1 through 5 had been operating since the 1950s, but were shut down in 1995. Units 6 and 7 started operation in the 1960s and continue in operation. For its entire operating life, about 50 years, MLPP has used a once-through cooling water system. Seawater is taken in through an intake structure in Moss Landing Harbor and used to cool the Power Plant. When old Units 1 through 5 were operating, heated cooling water from those Units discharged to Elkhorn Slough. Heated cooling water from Units 6 and 7 was and is discharged offshore to Monterey Bay. Modernized Units 1 and 2 share the Monterey Bay outfall with Units 6 and 7.

In order to assess the biological impacts of the Units 1 & 2 cooling water system on Elkhorn Slough and the surrounding environment, the Energy Commission and the Regional Board convened a technical working group (“TWG”) consisting of Energy Commission and Regional Board staff and their consultants (independent scientists), Duke Energy and their consultants, and California Department of Fish and Game staff.

Regional Board staff, based on TWG evaluation, concluded the biological impacts due to impingement and thermal discharge would not be significant but that entrainment impacts of the intake for Units 1 & 2 would be significant. On June 26, 2000, Regional Board staff issued a draft NPDES permit for MLPP. The draft permit recommended conditions regarding the Units 1 & 2 intake system, including requirements to upgrade the existing intake structure and to fund an Elkhorn Slough Foundation environmental enhancement project to improve marine life productivity in the Elkhorn Slough ecosystem with a payment of \$7 million.

In September 2000, the Regional Board convened a hearing on the draft NPDES permit. At the hearing, the Regional Board members requested additional information on intake alternatives, in particular an off-shore intake structure. The Regional Board continued the hearing to October 2000, and after considering additional evidence, including submissions and comments from the public, the Board adopted the NPDES permit that is the subject of this remand.

In October 2000, the Energy Commission approved Duke’s certification application. The Energy Commission certification, among other things, made findings based on the evidence, and set forth “conditions of certification”—such as compliance with the Regional Board’s NPDES permit—to ensure that the Project would conform with all applicable local, state and federal laws. The Certification was issued in November 2000.

LITIGATION AND REMAND BACKGROUND

Several members of the public filed petitions with the State Water Resources Control Board (State Board) challenging the NPDES permit on various grounds. In response to these petitions the State Board issued an order making a few minor changes to the NPDES permit. The State Board dismissed, without review, most of the contentions in the petitions. An organization called Voices of the Wetlands (VOW), filed a law suit in Monterey County Superior Court alleging the once-through cooling water system for Units 1 & 2 authorized by the NPDES permit did not comply with the requirements of Clean Water Action section 316(b) (33 U.S.C. section 1326(b).) That case is entitled *Voices of the Wetlands v. California State Water Resources Control Board, et al. Monterey County Superior Court No. M 54889.*

After a hearing on September 5, 2002, the Court issued an intended decision and on October 31, 2002, the Court adopted an Order incorporating the terms of its intended decision. On February 5, 2003, the Court remanded the NPDES permit to the Regional Board for further proceedings in accordance with its Order. **The Order directed the Regional Board to conduct a thorough and comprehensive analysis of Best Technology Available applicable to the Moss Landing Power Plant.**

The court found that a sentence in NPDES permit Finding 48, “in this case the costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits,” was not supported by the weight of the evidence because of the lack of a “comprehensive, definitive consideration of cooling water alternatives by the Regional Board.” The court did not reject the Regional Board’s use of the “wholly disproportionate” test, discussed below.

HEARING ISSUES

The Regional Board is convening this hearing in order to provide an opportunity for all parties to present evidence and analysis regarding the BTA alternatives, their costs and their environmental benefits. The best way to provide a comprehensive and thorough analysis of these issues is to consider the wide range of evidence and arguments submitted on all sides as well as comments from the public.

The Court did not remand the entire NPDES permit. Its Order only directed the Regional Board “to conduct a thorough and comprehensive analysis of Best Technology Available applicable to Moss Landing Power Plant.” Best Technology Available is a term taken from Clean Water Action section 316(b), which provides,

“Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”

The U.S. Environmental Protection Agency has interpreted this law to provide that a technology may not be required if the cost of the technology is “wholly disproportionate” to the benefit to be achieved. This standard has been affirmed by a federal court of appeals. Although VOW challenged the applicability of the “wholly disproportionate” test, the court in this case did not reject it. The court only held that the Regional Board did not have sufficient evidence to support its finding that costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits.

Because there was no challenge regarding the effects of the MLPP once-through cooling water system that could be caused by impingement/entrapment or by its thermal discharge, the issues in this hearing relate only to entrainment impacts of the Units 1 & 2 cooling water intake.

Testimony, other evidence and legal arguments submitted in this hearing must be in accordance with this Notice. Only relevant testimony and other evidence will be accepted into the record. All testimony, other evidence and legal arguments shall address one or more of the following issues:

1. What are the alternatives to once-through cooling for Units 1 & 2?
 - a. Which of these alternatives are effective to reduce entrainment?

- b. Are there reasons that any of these alternatives may not be feasible?
- c. What are the costs of these alternatives to once-through cooling?
- d. What are the environmental benefits of each alternative?
- e. Is the cost of the alternatives wholly disproportionate to their environmental benefit?

PROPOSED BOARD ACTION

To comply with the remand, the Regional Board will consider the evidence, including expert opinions and analysis, analysis of studies, reports and scientific literature, legal and policy arguments, the administrative record and public comment to determine whether the weight of the evidence supports retaining Finding 48 as it currently appears in the NPDES permit, or whether to consider amendment of the NPDES permit in regard to the Units 1 & 2 cooling water intake system. If the Board decides to consider amendment, it will comply with applicable laws and regulations regarding amendment of NPDES permits, including the requirement to publish a draft amended permit, to provide 30 days notice for public comment and to consider the amendment at a hearing. (see 40 C.F.R. section 122.62.)

PROCEDURAL LAW AND REGULATIONS

The hearing will be conducted pursuant to Title 23 California Code of Regulations (CCR) sections 648 through 648.8 and Government Code sections 11400 through 11470.50 (Administrative Procedure Act, Administrative Adjudication: General Provisions).

DESIGNATION OF PARTIES

Pursuant to Title 23 CCR section 648.1, parties to this hearing are the **Regional Board, Duke Energy, VOW and the Energy Commission.**

THE RECORD

The record for this proceeding will include:

1. The entire administrative record of the Regional Board and the State Board submitted to the Superior Court of Monterey County in *Voices of the Wetlands v. California State Water Resources Control Board et al.*, Monterey County Superior Court No. M 554889.
2. All written testimony, evidence, arguments and other documents submitted by the parties in accordance with this Notice.
3. All written policy statements of non-parties submitted by non-parties in accordance with the Notice.
4. The audio tape, transcript or transcript of audio tape of the Regional Board hearing and public comment period on May 15 that will be conducted in accordance with this Notice.

POLICY STATEMENTS BY NON-PARTIES

All interested persons, who have not been designated as parties may present policy statements to the Regional Board.

A policy statement is a non-evidentiary statement. It may include (1) the policy views and position of the speaker, (2) non-expert analysis of evidence that already has been presented, or (3) argument concerning the contents of draft documents. Persons who wish to make only a policy statement may do so, subject to the following provisions:

Each person's time for oral policy statements will be limited to **three minutes**. Statements should be confined to issues specified in this Notice and only to matters within the Board's jurisdiction.

Interested persons are encouraged to submit written policy statements before the day of the Board meeting. Written comments and policy statements must be submitted to the Regional Board, attention Michael Thomas at the address below. All written comments or statements must be received by **Monday, April 14, 2003**. Written comments or statements submitted to the Regional Board after that date will not be included in the administrative record, except at the discretion of the Chair.

Persons making such statements will not be sworn or asked to affirm the truth of their statements.

At the discretion of the Chair, questions may be addressed to persons making only policy statements for the purpose of clarifying their statements. However, such persons shall not be subject to cross-examination and may not cross-examine hearing witnesses or interested parties.

HEARING PARTICIPATION BY PARTIES

Parties will submit evidence and legal argument and participate in cross-examination in the hearing only in compliance with the following procedures. PLEASE TAKE NOTICE that the following procedural requirements will apply and will be strictly enforced for purposes of the above-mentioned hearing.

Direct Testimony, Evidence and Argument

Parties shall **submit to the Regional Board** (unless otherwise noted) on or before **Monday April 14, 2003**:

1. Fourteen copies of each party's direct testimony and supporting legal and policy arguments. Testimony may include expert opinions and analysis. Testimony may also include analysis of studies, reports and scientific literature. Staff's testimony may be in the form of a staff report.
2. Fourteen copies of exhibits each party intends to refer to at the hearing. Reduced sized copies of large maps or illustrations may be submitted. Visual or audio aids (e.g., slides, video tapes, or Power point presentations) that will be used to aid with summary presentations or arguments at the hearing need not be provided. Visual/audio aids may only be used at the hearing to summarize a party's direct testimony, legal argument, or policy argument, as submitted by the due date. Visual/audio aids shall not be used to present information that was not submitted by the due date.
3. Fourteen copies of a list of documents or evidence, **other than** testimony, each party wants to enter into the record.

4. Fourteen copies of excerpts of documents or evidence, **other than** testimony, from the existing administrative record or new submissions that each party refers to in its testimony or legal argument so that the Board members can easily refer to the relevant reference.
5. One copy of all the submissions covered by items 1. through 4. above, to all of the other parties (Duke Energy, Energy Commission, VOW). Additionally, if a party plans to add a video or audio tape to the Administrative Record, a copy of the tape must also be submitted to the other parties.
6. One copy of each document, study, report, audio tape, video tape or other evidence, each party would like added to the Administrative Record. Upon request of another party, each party shall provide a copy of any document, study, report, or tape to the requesting party.

If provision of fourteen copies of items 1. through 4 is too burdensome for a party, this requirement may be waived by the Executive Officer upon request, which must be made not later than **Wednesday April 9, 2003**.

Absent extenuating circumstances, direct testimony, evidence arguments and exhibits that do not comply with the above requirements may not be admitted.

Rebuttal Evidence and Argument

Rebuttal testimony, other evidence and legal arguments shall be limited to responses to direct testimony, evidence and legal arguments offered by other Parties. Rebuttal is not an opportunity to raise new issues. The Chair will have the discretion to strike any rebuttal testimony, evidence or legal argument that does not comply with this requirement.

Parties shall **submit to the Regional Board** (unless otherwise noted) so that it is received on or before **Monday April 28, 2003:**

1. Fourteen copies of each party's rebuttal testimony and supporting legal and policy arguments. Testimony may include expert opinions and analysis. Testimony may also include analysis of studies, reports and scientific literature. Staff's testimony may be in the form of a staff report.
2. Fourteen copies of rebuttal exhibits each party intends to refer to at the hearing. Reduced sized copies of large maps or illustrations may be submitted. Visual aids that will be used to aid with summary presentations or arguments at the hearing need not be provided. Visual aids may only be used at the hearing to summarize a party's rebuttal testimony, legal argument, or policy argument, as submitted by the due date. Visual aids shall not be used to present information that was not submitted by the due date.
3. Fourteen copies of a list of documents or evidence, other than testimony, each party wants to enter into the record by way of rebuttal evidence.
4. Fourteen copies of excerpts of documents or evidence, other than testimony, from the existing administrative record or new submissions that each party refers to in its rebuttal testimony or legal argument so that the Board members can easily refer to the relevant reference.
5. One copy of all the submissions covered by items 1. through 4. above, to all of the other parties

(Duke Energy, Energy Commission, VOW). Additionally, if a party plans to add a video or audio tape to the Administrative Record, a copy of the tape must also be submitted to the other parties.

6. One copy of each document, study, report, audio tape, video tape or other evidence, each party would like added to the Administrative Record as rebuttal evidence. Upon request of another party, each party shall provide a copy of any document, study, report, or tape to the requesting party.

If provision of fourteen copies of items 1. through 4. is too burdensome for a party, this requirement may be waived by the Executive Officer upon request, which must be made not later than **Wednesday April 23, 2003**.

Submissions to the Regional Board shall be addressed to:

Michael Thomas
Regional Water Quality Control Board
Central Coast Region
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401
Fax: (805) 543-0397

Phone: (805) 542-4623
E-mail: mthomas@rb3.swrcb.ca.gov

Submissions to Duke Energy shall be addressed to:

Randall J. Hickok, Vice President Marketing
& Regulatory Affairs, Duke Energy North America
1290 Embarcadero Road
Morro Bay CA 93442
Fax: (805) 595-5592
Phone: (805) 595-5595

Submissions to VOW shall be addressed to:

Deborah A. Sivas
Earthjustice Legal Defense Fund
Owen House—553 Salvatierra Walk
Stanford, California 94305-8620
Fax: (650) 725-8509
Phone: (650) 723-0325 or (650) 725-8571

Submission to Energy Commission shall be addressed to:

William M. Chamberlain, Chief Counsel
California Energy Commission
1516 9th Street, MS-14

Sacramento, CA 95814
Fax: (916) 654-3951
Phone: (916) 654-3843

CONDUCT OF HEARING

All witnesses who have submitted written direct testimony shall be present at the hearing and shall, under oath, affirm their written testimony.

Each party's representatives will have an opportunity to present a summary of the party's direct and rebuttal testimony. The summary need not be presented by a witness. After each party completes its testimony summary and any legal arguments, each of that party's witness will be subject to cross-examination by all other parties.

After all summaries of direct testimony and cross-examination are complete, non-parties will have an opportunity to make policy statements.

After non-parties complete policy statements, all parties will have an opportunity to present closing statements.

The following time limitations will apply unless modified by the Regional Board Chair at the time of the hearing:

Regional Board staff, Duke Energy and VOW will have a total of **50 minutes each** to summarize direct and rebuttal testimony and other evidence submitted in advance and to cross-examine other party's witnesses. Each party may allocate their 50 minutes as they choose, as long as they do not exceed the total allocation.

The Energy Commission will have a total of **20 minutes** to summarize direct and rebuttal testimony and other evidence submitted in advance and to cross-examine other party's witnesses. The Energy Commission may allocate its 20 minutes as it chooses, as long as it does not exceed the total allocation.

Each party will have an additional **3 minutes** for closing statements.

Board members' and Board legal counsel's questions are in order at any time but they will be asked to hold their questions until the end of each party's presentation in order to facilitate measuring the time allocation. The Chair may rule inadmissible or out-of-order testimony and cross-examination that is irrelevant, repetitive, or disruptive of the orderly conduct of the hearing.

The Board may continue the hearing and may require submission of additional evidence or argument at their discretion.

ORDER OF PRESENTATION

1. Regional Board staff summary of direct and rebuttal testimony, evidence and legal argument
2. Cross-examination of staff witnesses by other parties

3. Duke Energy summary of direct and rebuttal testimony, evidence and legal argument
4. Cross-examination of Duke Energy witnesses by other parties
5. VOW summary of direct and rebuttal testimony, evidence and legal argument
6. Cross-examination of VOW witnesses by other parties
7. Energy Commission summary of direct and rebuttal testimony, evidence and legal argument
8. Cross-examination of Energy Commission witnesses by other parties
9. Opportunity for non-parties to make policy statements
10. Closing statements by Regional Board staff, Duke Energy, VOW and Energy Commission

There will be a number of short breaks at the discretion of the Chair. If necessary, the Chair may call for a dinner break.

INQUIRIES AND COPIES OF DRAFTS

A copy of this Notice and the NPDES permit that is the subject of the remand, and all submissions to the Regional Board may be reviewed and copied at the office of the Central Coast Regional Water Quality Control Board, **895 Aerovista Place, Suite 101, San Luis Obispo 93401**, on weekdays between the hours of 8:30 a.m. and 4:30 p.m.